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No. 91-850

In the Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN K. ENGLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government used against petitioner information acquired from him under a grant of use immunity.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 7a-12a, is reported at 33 M.J. 37. The opinion of the Air Force Court of Military Review, Pet. App. 1a-6a, is reported at 30 M.J. 1030. The findings of fact by the trial court, App., *infra*, 1a-3a, are unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 3, 1991. The petition for a writ of certiorari was filed on December 2, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following his entry of a conditional guilty plea, petitioner was convicted of one specification of the wrongful use of cocaine on diverse occasions, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to eight months' confinement, a bad conduct discharge, forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The court of military review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Early in June 1989, an airman in petitioner's dormitory died of a drug overdose. Thereafter, five servicemembers living in that dormitory were given urinalysis tests for drug use. One, Airman Donald Brister, tested positive. On June 30, Special Agent Gary Collier of the Air Force Office of Special Investigations (OSI) questioned Brister about his possible involvement in illegal drug activities. Tr. 30. Airman Brister gave the agent a written statement in which he admitted using cocaine and in which he implicated petitioner and two other servicemembers, including Airman James Maish, in the use of cocaine on four separate occasions. AX 4. Agent Collier also interviewed petitioner that day. During the interview petitioner admitted having used cocaine on two occasions. Tr. 31; AX 3. See Pet. App. 2a, 8a.

Nearly three months later, on September 26, Captains Nick Sakellis and Steven Tomanelli interviewed petitioner pursuant to a grant of use immunity dated September 18, 1989. Tr. 15; AX 2. The Air Force

granted petitioner use immunity in order to be able to ask him whether he knew about any drug use by Airman Maish. Tr. 13, 14. Captain Tomanelli asked petitioner only about possible drug usage by Airman Maish. Tr. 14. Petitioner denied having any such knowledge. Captain Tomanelli did not ask petitioner about petitioner's own drug use. *Ibid.*[1]

One month later, on October 18, Captain Tomanelli acted as counsel for the government in a hearing for petitioner held pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 832, to determine whether the case against petitioner should proceed forward to a court-martial.[2] Late that month

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[1] During the hearing on petitioner's motion to dismiss, Captain Tomanelli described his questioning of petitioner as follows, Tr. 13-14:

> The total interview took about twenty minutes. About half of that time was spent with my co-counsel, Captain Sakellis, discussing the air traffic controller field with [petitioner], since Captain Sakellis was a prior enlisted person in that career field. But the actual substance of the interview was actually about ten minutes.
>
> My framework for the interview was to ask [petitioner] did he see Maish use on any of the occasions that Brister indicated that Maish had used. None of the questions I asked [petitioner] concerned his own use or his own involvement in drugs or anything else that could be used against him in any subsequent trial of his own.
>
> * * * * *
>
> There really was no information of value gained from that interview. Essentially he denied ever seeing Maish use any kind of controlled substance. Since I was prosecuting Maish those were the only questions I asked. I never asked [petitioner] about his own involvement in drug use.

[2] An Article 32 hearing in the military is similar to a preliminary hearing in the civilian criminal justice system.

or early in November, at the suggestion of Air Force headquarters, Captain Tomanelli removed himself as the prosecutor in petitioner's case, since he had interviewed petitioner under a grant of use immunity. The captain, however, continued to advise his replacement about the admissibility of Brister's and petitioner's statements. Tr. 18-19.

2. Petitioner thereafter filed a motion to dismiss the charge of wrongfully using cocaine. The gravamen of petitioner's claim was two-fold: He claimed that the government used his statements during the September 26 interview in deciding to charge him with cocaine use. Petitioner further argued that the prosecution of him was tainted in two respects: Captain Tomanelli participated in the Article 32 hearing before he was replaced as the prosecutor, and Captain Tomanelli thereafter continued to advise his replacement about the case. AX 1, at 1-2.

The trial judge held a hearing on the motion. Tr. 13-43. After the hearing, the trial judge denied petitioner's motion to dismiss the charge and made extensive findings of fact. Tr. 43-45; App., *infra*, 1a-3a.[3] The trial court made the following critical findings, *ibid.*:

> Three, the AFOSI ceased their investigation of the accused's alleged use of cocaine not later than 29 August 1989. However, the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida. The proposed evidence was the aforementioned statement by Airman Brister

[3] The trial judge's findings of fact are reprinted as an appendix to this brief.

and the accused's admissions to Special Agent Collier.

* * * * *

Eleven, no information obtained during the course of the immunized interview, other than the fact that no relevant information was obtained, was passed by Captain Tomanelli to the current trial team.

Twelve, the evidence the government intends to introduce to prove its case is the same evidence that was available to officials on or shortly after 30 June 1989, that is the statement of Airman Donald K. Brister, and the admissions made to Special Agent Collier by the accused on 30 June 1989.

Thirteen, the proffered evidence though not, [*sic*] "categorized and sealed", [*sic*] as suggested by our appellate courts, is nevertheless specifically identifiable as to its source and date of acquisition.

Fourteen, the proffered evidence has likewise affirmatively been shown to be from sources obtained prior to and independent from any information provided by the accused during the course of his immunized interview on 26 September 1989.

Thereafter, petitioner entered a conditional guilty plea to numerous uses of cocaine.[4]

3. The Air Force Court of Military Review affirmed. Pet. App. 1a-6a. It upheld the trial judge's

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[4] Rule for Courts-Martial 910(a)(2), *Manual for Courts-Martial, United States—1984*, permits a military defendant, with the consent of the government and the approval of the trial judge, to enter a conditional plea of guilty in order to preserve his right to obtain appellate review of adverse rulings on pretrial motions.

finding that, before petitioner was granted use immunity, the government had both Airman Brister's statement incriminating petitioner and petitioner's own confession. *Id.* at 4a. The court also found that the government did not use against petitioner anything that it learned during the September 26 interview. *Id.* at 3a.

4. The Court of Military Appeals affirmed. Pet. App. 7a-12a. It found that petitioner's September 26 interview was a "non-event" because "nothing was learned in the interview which might incriminate [petitioner] or otherwise be used to his disadvantage." *Id.* at 11a, 12a. The court also found that petitioner was not prejudiced by Captain Tomanelli's participation in the Article 32 hearing. *Id.* at 11a-12a.

ARGUMENT

Petitioner claims that the government violated his Fifth Amendment privilege against compulsory self-incrimination by using against him statements that he made during the September 26 interview. That claim does not warrant review by this Court.

1. After an evidentiary hearing, the trial court found that the government made no use of petitioner's statements to Captains Tomanelli and Sakellis during the September 26 interview. The court of military review and the Court of Military Appeals upheld that finding, and the concurrent findings of the lower military courts do not warrant review by this Court. See, *e.g.*, *Doe* v. *United States*, 465 U.S. 605, 613-614 (1984). Moreover, petitioner did not make any statement during the September 26 interview that could have been of use to the government. Captain Tomanelli asked petitioner about Airman Maish's, not petitioner's drug use, and petitioner denied having

any such information. Petitioner also points to no information that he gave Captain Tomanelli that the government could have used against him. The Court of Military Appeals was therefore correct in describing the September 26 interview as a "non-event." Pet. App. 11a-12a.

Captain Tomanelli's involvement in petitioner's Article 32 hearing consisted of minimal questioning of two witnesses, Airman Brister and Agent Collier. Airman Brister was asked one question: whether he would adopt his prior statement. Tr. 14; AX 6. Agent Collier was asked only one question: to give a narrative account of his interview of petitioner. *Ibid.* While there is some evidence that Captain Tomanelli gave advice to the new prosecution team about how to admit petitioner's confession, Tr. 22-23, in the interview petitioner merely denied having any knowledge of any drug activity by Airman Maish, so petitioner's interview clearly was not helpful to the government's efforts to have the confession admitted.

In *United States* v. *Gardner*, 22 M.J. 28 (1986), the Court of Military Appeals outlined several factors to be used in determining whether the government has met its burden to show that its evidence against an accused was obtained from a source wholly independent of the accused's immunized interview, as required by *Kastigar* v. *United States*, 406 U.S. 441 (1972).[5] In this case, each factor supports the con-

[5] The Court of Military Appeals listed the following factors in *Gardner*, 22 M.J. at 31: (1) whether a defendant's immunized statement revealed anything that was not already known by the government; (2) whether the investigation against the defendant was completed prior to the immunized statement; (3) whether the decision to prosecute the defendant was made prior to the immunized statement; and (4)

clusion that the government obtained its evidence against petitioner from independent sources. First, the government did not learn anything about petitioner's cocaine use from the September 26 interview. Second, the government had completed its investigation of petitioner on August 29, 1989, Tr. 32, three weeks before he was granted use immunity on September 18, 1989. Third, the government decided to prosecute petitioner for his drug use shortly after June 30, 1989, which was, again, well before petitioner was granted use immunity and interviewed.[6] Fourth, Captain Tomanelli removed himself from petitioner's case before petitioner entered his plea, and the captain told the prosecutor only that "no relevant information was obtained" from the September 26 interview. App., *infra*, 2a. In sum, petitioner cannot escape the fact that his prosecution was not tainted by evidence derived from the immunized interview because there was *no* evidence derived by the prosecution from the interview.

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whether the trial judge disqualified a trial counsel who had been exposed to the immunized statement.

[6] The Court of Military Appeals stated that "[i]t also is clear from [Captain Tomanelli's] testimony at trial that the decision to prosecute [petitioner] had not yet been made at the time of the immunized interview." Pet. App. 11a. That statement is wrong in two respects. First, the government had decided to prosecute petitioner before the September 26 interview. The trial judge found that "the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida," App., *infra*, 1a; Tr. 43-44, and the evidence supports that finding, Tr. 17-18. The Court of Military Appeals simply misread the record. Second, there was no trial held in this case. After the trial court denied petitioner's motion to dismiss the charge, petitioner entered a conditional guilty plea.

2. Petitioner asserts that there is a "divisive split in the courts on the issue of whether the Fifth Amendment precludes the use of nonevidentiary fruits of an interrogation compelled under a grant of immunity." Pet. 3. This case does not present that question, however, since the Court of Military Appeals agreed with petitioner that the government cannot make nonevidentiary uses of information acquired from someone under a grant of use immunity. As the Court of Military Appeals explained, "[petitioner] argues correctly that, once the Government elects to immunize a member in order to obtain evidence, immunity extends not only to use of the information obtained but also to derivative use." Pet. App. 10a-11a. The military courts simply found that the government had made no use of petitioner's statements. Accordingly, this case does not present the question that petitioner has asked the Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The trial judge made the following findings of fact, Tr. 43-45:

> Having carefully considered the testimony of the witnesses called before this court and the documentary evidence introduced as Appellate exhibits I through VI, the court finds, by clear and convincing evidence, the following:
>
> One, on 30 June 1989, as a consequence of the sworn statement given by Airman Donald K. Brister to AFOSI Special Agent Gary W. Collier the accused, Airman Stephen K. England, was first identified as a suspected user of cocaine.
>
> Two, on the same date, 30 June 1989, Special Agent Gary W. Collier, [*sic*] interviewed the accused and elicited allegedly incriminating admissions on the part of the accused relating to his past use of the drug cocaine.
>
> Three, the AFOSI ceased their investigation of the accused's alleged use of cocaine not later than 29 August 1989. However, the decision to court-martial the accused was made on or shortly after 30 June 1989 by officials of the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida. The proposed evidence was the aforementioned statement by Airman Brister and the accused's admissions to Special Agent Collier.
>
> Four, the accused was granted testimonial immunity on 18 September 1989 by the general court-martial convening authority in an effort to secure additional evidence concerning the alleged

use of cocaine on the part of one Airman James A. Maish.

Five, [o]n 26 September 1989, the accused was interviewed under a grant of immunity by Captains Steven N. Tomanelli and Nicolas G. Sakellis, both assigned to the Homestead Air Force Base, Office of the Staff Judge Advocate.

Six, during the course of his immunized interview, the accused provided no information relevant to the prosecution of the case at bar nor to that of Airman James A. Maish and Captain Tomanelli made this fact known to the staff judge advocate and the trial counsel present in the court today.

Seven, on 17 October 1989, the current charge was preferred against the accused and on the same date major David F. Garber, also assigned to the Homestead legal office, was detailed as the Article 32 UCMJ Investigating Officer.

Eight, Captain Steven N. Tomanelli served as the government's representative during the course of the accused's Article 32 UCMJ investigation. Captain Tomanelli declined to interview Special Agent Collier during the investigation due to the fact that he had previously interviewed the accused under a grant of immunity. The investigating officer interviewed Special Agent Collier.

Nine, no evidence forwarded to the general court-martial convening authority via the accused's Article 32 UCMJ Investigation contained evidence of or derived from the accused's immunized interview with Captain Tomanelli on 26 September 1989.

Ten, at the suggestion of officials from Headquarters, Ninth Air Force, Captain Tomanelli was removed as the prospective trial counsel for the case at bar sometime in mid to late October 1989, but has continued in an advisory capacity to the trial team consistent with his role as Chief of Military Justice.

Eleven, no information obtained during the course of the immunized interview, other than the fact that no relevant information was obtained, was passed by Captain Tomanelli to the current trial team.

Twelve, the evidence the government intends to introduce to prove its case is the same evidence that was available to officials on or shortly after 30 June 1989, that is the statement of Airman Donald K. Brister, and the admissions made to Special Agent Collier by the accused on 30 June 1989.

Thirteen, the proffered evidence though not, [*sic*] "categorized and sealed", [*sic*] as suggested by our appellate courts, is nevertheless specifically identifiable as to its source and date of acquisition.

Fourteen, the proffered evidence has likewise affirmatively been shown to be from sources obtained prior to and independent from any information provided by the accused during the course of his immunized interview on 26 September 1989.

Accordingly, the defense Motion to Dismiss is denied.

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